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HAROLD B. WILLEY,

No. 894

In the

Supreme Court of the United States

OCTOBER TERM 1955

EDWARD E. MORGAN CO., INC., JONES & GILLIS, INCORPORATED, UNITED STATES FIDELITY AND GUARANTY CO., and STANDARD ACCIDENT INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, for the use of W. O. PELPHREY,

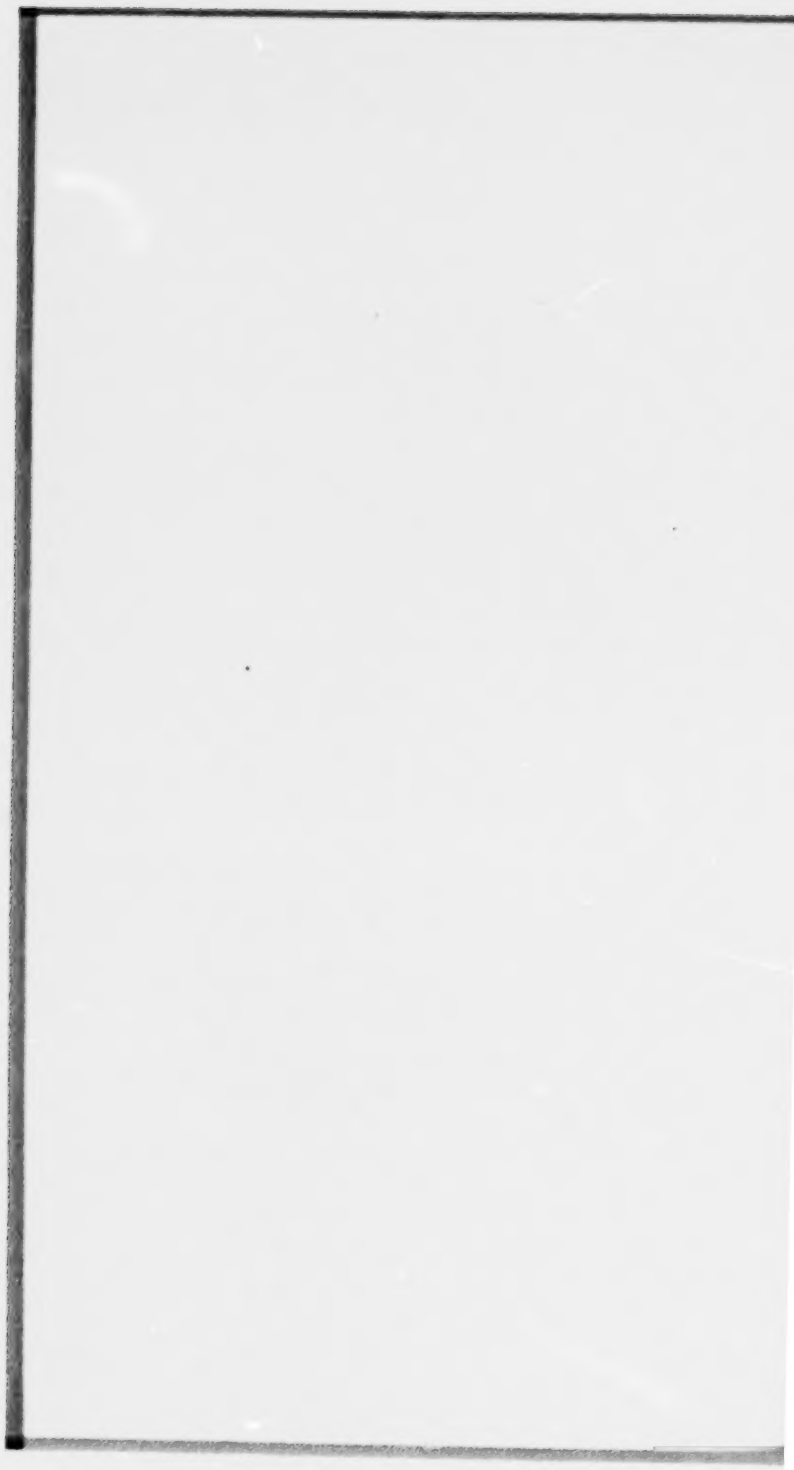
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2-4
Statutes and Regulations Involved	4
Statement	4-9
Argument	9-17
Conclusion	18
Certificates	18
Appendix	19

Page

Continental Casualty Company v. Clarence L. Boyd Company (10th Cir.), 140 Fed. 2d 115 17

Crumpton v. United States, 138 U. S. 361, 34 L. Ed. 958, 11 S. Ct. 355 12

Kirby H. Jackson, et al. v. C. E. King (5 C. A.), 223 Fed. 2d 714, 718 13

Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840 16

Minnich v. Gardner, 292 U. S. 48, 78 L. Ed. 1115, 54 S. Ct. 567 16

National Labor Relations Board v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453 12

Owens v. Union Pacific Railroad Company, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, cert. den., 323 U. S. 740, 89 L. Ed. 593, 65 S. Ct. 57 16

Saltonstall v. Birtwell, 164 U. S. 54, 41 L. Ed. 348, 17 S. Ct. 19 16

Sozinsky v. United States of America, 300 U. S. 506, 81 L. Ed. 772, 57 S. Ct. 554 16

Troxell v. Delaware, Lackawanna & Western Railroad Company, 227 U. S. 434, 57 L. Ed. 586, 33 S. Ct. 274 12

United States for use and benefit of Lichter v. Henke Construction Co. (8th Cir.), 157 Fed. 2d 13 17

United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 1091 12

28 U. S. C. A., Sec. 1961 ..... 4, 16, 17

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v.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is unreported. The opinion and dissenting opinion of the court of appeals is at the present time also unreported, but a copy thereof appears in the appendix to the petition for certiorari at pages A1-A16.

JURISDICTION

The judgment of the court of appeals affirming the judgment of the district court (R. 234-236) in favor of Respondent was rendered on February 23, 1956 (R. 263). Appellants' petition for rehearing, timely filed, was denied on March 23, 1956 (R. 284). The petition for a writ of certiorari was filed April 23, 1956. Petitioners have sought to invoke the jurisdiction of this court under *28 U. S. C. A. Section 1254(1).*

QUESTIONS PRESENTED

The questions are:

1. (a) Was there sufficient evidence presented for the trial court to submit the following special issue to the jury:

> "Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement?"

or should the trial court have granted the Petitioners' request for a peremptory instruction or directed verdict?

(b) Did the trial court err in refusing to give Petitioners a peremptory instruction or directed verdict based upon the fact that during the trial of the case and at the direction of the clerk of the court the Respondent endorsed Petitioners' check by making same payable to the Clerk of the District Court, who later caused same to be cashed

and deposited into his official funds as funds paid and held in the registry of the court, said check having theretofore been issued to Respondent by Petitioners with notations thereon to the effect that the check was in full settlement of all work done by Respondent pursuant to his contract with Petitioners?

2. Were the instructions which the trial court gave the jury proper and sufficient to enable the jury to understandingly discharge its duty, or was it necessary for the trial court to give the jury the additional instructions requested by Petitioners in order for the jury to understandingly discharge its duty?

3. Did the court err in admitting testimony on the usage and custom prevailing in Texas, the state where the contract was performed, to the effect that when crushed rock is bought and sold at the bins it is measured by the cubic yard content of the trucks hauling the rock?

4. Are the Petitioners entitled to have this court pass upon a question which has not been previously raised in or passed upon by either of the lower courts but for the first time has been presented as a part of the petition for certiorari filed by Petitioners, the question being: Does the judgment for the Respondent entered by the trial court for $30,325.33 together with interest thereon at the rate of six per cent (6%) per annum from the 24th day of July, 1953, to the date of this judgment, for an aggregate amount of $33,346.74, and with further interest at the rate of six per cent (6%) per annum as provided by law from the date of entry of this judgment until paid,

* * *" contravene the Federal Statute *(28 U. S. C. A., Section 1961)*?

STATUTES AND REGULATIONS INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in this case, other than *28 U. S. C. A., Section 1961*, set forth in the Appendix hereto.

STATEMENT

The pertinent facts are set forth in the opinion of the Court of Appeals appearing at pages A1 to A8 inclusive of the appendix to the petition for certiorari and are also set out below as follows:

Two of the petitioners (referred to in this statement as "Prime Contractors") had the prime contract with the United States of America for the construction of runway, taxiway and parking apron extensions on the Gray Air Force Base at Killeen, Texas (Pl. Ex. 10; R. 30-66, 121). United States Fidelity and Guaranty Company is surety on the construction bond furnished the United States by the Prime Contractors (R. 3, 7). Standard Accident Insurance Company is the surety on the supersedeas bond made by the other three petitioners. Respondent became a subcontractor of Prime Contractors by virtue of two letters, one being a letter dated April 7, 1953 written by Respondent addressed to Prime Contractors at Killeen, Texas (Pl. Ex. 1; R. 14-15, 108) wherein it was stated:

> "We propose to furnish all equipment, tools, labor, and incidentals necessary to excavate and crush a minimum of 40,000 C. Y. of Edwards Limestone * * *.

At your option, the material will be stockpiled or delivered to your handling units from our bins, provided the hauling units you choose can clear our bins without alteration there to. * * *. This work to be performed in accordance with specifications and to meet the screen analysis of the specifications. * * *.

"For the above work we quote 1.01 per C. Y. Partial payment to be made by the 10th of each month. Final payment 15 days after completion of job."

The other was a letter of acceptance from Prime Contractors, dated April 13, 1953, addressed to Respondent (Pl. Ex. 2; R. 15-16, 108), the pertinent parts of which are:

"We herewith accept your proposal of April 7, 1953 to crush the rock for the extension of Gray Air Force Base Runway and Taxiway.

* * * * *

"You will also be governed by the same regulations, as to wages, etc., that we are under the terms of our contract."

Prime Contractors were paid by the United States for the crushed stone base course constructed by them on the basis of measuring the material after same had been compacted in place (Pl. Ex. 10; R. 82-83, 121). After Respondent had fully completed his contract Prime Contractors then, and not until then, made the contention that they were to pay Respondent on the same basis on which they were paid by the United States and to support said contention insisted that the specifications of the prime contract became a part of the subcontract for the purpose of measurement and computing payment. Outside of mining and crushing the rock Respondent had absolutely nothing whatsoever to do with same nor did he have any control

over it after it left his bins (R. 175) and actually some of the rock crushed by Respondent was used in the construction of a perimeter road for which the Prime Contractors were paid on the basis of square yard measurement (R. 158-159), and still more of the rock was used in the construction of or at a fire station (R. 167-168).

The evidence is undisputed that Respondent, by truck measurement, crushed for and delivered to Prime Contractors 47,980 cubic yards of rock (R. 114) and Prime Contractors paid another subcontractor of theirs for hauling this 47,980 cubic yards of crushed stone (Pl. Exs. 13-A through 13-H; R. 67-71, 137). Both Prime Contractors and Respondent kept daily records of the number of cubic yards by truck measurement which were crushed and delivered (R. 140-142).

On June 26, 1953 Respondent submitted to the Prime Contractors an estimate for the period through June 25, 1953, based upon the crushing of 30,730 cubic yards of stone (Pl. Ex. 3; R. 16, 111). On July 1, 1953 Prime Contractors sent Respondent an estimate showing 14,863 cubic yards of stone used in the runways and taxiways and 2,000 cubic yards used in the perimeter road, which estimate was only for the period ending June 15, 1953 (Pl. Ex. 4-A; R. 18, 112). This estimate was transmitted by a letter from the Prime Contractors advising Respondent that the figures were taken from the estimate of the United States Engineers and were approximate only. The letter further stated that the work for the period June 1st through the 25th would come through on the July 25th

statement (Pl. Ex. 4; R. 17, 112). The amount of stone shown on the Prime Contractors' estimate furnished Respondent was only 97 cubic yards less than Respondent's records showed had been delivered through June 15th. (Pl. Ex. 12; Supp. R. 2-3, R. 110). Upon completion of his work Respondent billed the Prime Contractors with mining and crushing 47,980 cubic yards of stone at the contract price of $1.01, or $48,459.80, upon which he credited the July 1st payment of $17,031.63, leaving a balance as shown by his invoice of $31,428.17 (Pl. Ex. 5; R. 20, 114).The Prime Contractors using the "in place" measurement determined the total amount payable under the subcontract to be $33,938.00, from which was deducted the previous $17,031.63 payment, as well as certain other small charges (Pl. Ex. 6; R. 20-21, 115) and tendered payment on this basis, same being refused (R. 116). Subsequently, Prime Contractors, by letter dated August 21, 1953 (Pl. Ex. 7; R. 23-24, 117), offered payment based on the 40,000 cubic yard minimum quantity specified in the letter agreement and enclosed their check payable to Respondent in the sum of $22,374.44 with the notation thereon to the effect that the check was in full settlement for all work done by Respondent on the Gray Air Force Base Texas Job (Pl. Ex. 9-A; R. 28-29, 119). Respondent refused such tender and later brought suit under the Miller Act *(40 U. S. C. A. Section 270a, et seq.)* for $31,428.17, being the amount claimed by him (R. 1-5). In the complaint filed by Respondent the check of Prime Contractors for $22,374.44 was informally tendered into the registry of the court (R. 5). Respondent requested permission of the Prime Contractors

for authority to use the check without prejudice, but said request was refused (R. 120). During the trial of the case and while Respondent was on the stand as a witness in his own behalf and at the direction of the clerk, Respondent endorsed the check so as to make it payable to the clerk who subsequently deposited same into his official funds as funds paid and held in the registry of the court (A. 120, 210), where same still remain (R. 218).

During the trial the Prime Contractors interposed objections to evidence offered by Respondent regarding the custom of measuring by truck measurement, rock and gravel sold from bins because this custom was not pleaded. The court overruled the objection and gave Respondent leave to amend (R. 187), which amendment was duly filed (R. 6). Thereafter, considerable evidence was introduced to the effect that there was a general custom or usage existing throughout Texas that crushed stone at the bins was bought and sold by loose truck measurement (R. 188, 189, 191, 193, 200).

The Prime Contractors requested the court to give the jury several special instructions (R. 211-213). The Prime Contractors also asked for a peremptory instruction based upon the endorsement in court of the check which bore the "full settlement" notation (R. 213). The requested instructions were refused (R. 213) and the court defined "preponderance of the evidence and submitted the question on one special issue, to-wit:

> "Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was

> entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement?"

and then charged the jury that "You are the exclusive judges of the facts proven, of the credibility of witnesses, and the weight to be given their testimony, * * *." (R. 215).

The jury gave an affirmative answer to the question (R. 215) and the court entered judgment for the Respondent (R. 217-218).

The Court of Appeals affirmed the district court's judgment in favor of the Respondent (R. 263).

ARGUMENT

This case presents no question calling for review by this court. In rejecting each of petitioners' contentions the court below correctly applied established principles and there is no conflict of decision, nor is there any question of public or general importance involved in this case.

(1)(a) The letter proposal of April 7, 1953 (Pl. Ex. 1; R. 14-15, 108) and the letter of acceptance dated April 13, 1953 (Pl. Ex. 2; R. 15-16, 108) constitute the contract between the parties. The Prime Contractors contend that the words "This work to be performed in accordance with the specifications and to meet the screen analysis of the specifications" contained in the letter proposal have the effect of including the provisions of the specifications relating to the method of measurement upon which the Prime Contractors were paid for the crushed rock in place by

the United States into the letter proposal for the purpose of determining the method of measurement upon which Respondent was to be paid for the crushed rock furnished by him (R. 146). Such contention is wholly without merit. The above quoted reference to the specifications in the letter proposal in effect states only two things, one being that the work to be performed by Respondent (the work being the operation of the quarry) would be done in accordance with the provisions of the specifications and the other being that the crushed rock material would meet the screen analysis of the specifications. Each and all of the other provisions of the specifications relating to "CRUSHED STONE BASE COURSE" (Pl. Ex. 14; R. 71-83, 161) was the responsibility of the Prime Contractors (R. 172-176) even to the quality of the stone in the quarry which was to be crushed (R. 176).

The evidence is clear and convincing that it was the intention of the parties at the time the contract between them was entered into that Respondent was to be paid for the stone crushed by him on the basis of truck measurement. The letter proposal (Pl. Ex. 1; R. 14-15, 108) specifically states "* * *, the material will be stockpiled or delivered to your handling units from our bins, provided the hauling units you choose can clear our bins without alteration there to." Couple this language with the fact that a general usage and custom exists in Texas that the basis of measuring crushed rock sold at the bins is by loose truck measurement (R. 186-201), the contract admits of no interpretation but that the rock crushed by Respond-

ent was to be measured and paid for on the basis of the cubic yard content of the truck or hauling unit in which the material was hauled.

The actions of the parties clearly indicate that at the time the contract was entered into the parties intended that the rock furnished and purchased was to be measured on the basis of truck measurement. This is shown by the following:

(1) Petitioners used trucks for hauling the crushed rock;

(2) Both parties kept a daily record of the number of truck loads of rock that were delivered by Respondent to Petitioners' hauling units (Pl. Ex. 12; Supp. R. 2-3, R. 110 and R. 140-142);

(3) The only partial payment being for 16,863 cubic yards of rock furnished through June 15th, made by Petitioners during the progress of the work (Pl. Exs. 4 and 4-A; R. 17-18, 104) came within 97 cubic yards of constituting payment in full for the 16,960 cubic yards of rock measured by truck measurement actually furnished through the same date according to the records of Respondent (Pl. Ex. 12; Supp. R. 3, R. 110). This shows that at that time Prime Contractors were not paying on the basis of "in place" measurement, but to the contrary they actually paid on the basis of truck measurement;

(4) Petitioners at no time furnished Respondent with any engineer's estimates (R. 157) although they

now say that Respondent is to be paid according to the engineer's estimates;

(5) After the crushed rock left Respondent's bins he had nothing whatsoever to do with it and same became the sole responsibility of Prime Contractors to do with as they pleased (R. 175); and

(6) Petitioners not only used the crushed rock in the construction of the Gray Air Force Base Runways and Taxiways but also used some of it in a fire station and in a perimeter road (R. 167, 168).

From the foregoing, it is inescapable that the evidence is more than adequate to sustain the verdict. The law is well settled that the Supreme Court will not weigh conflicting testimony, but will only determine whether there is evidence adequate to sustain the verdict.[1]

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

(b) The circumstances under which the check with the "full settlement" notation thereon was made payable, by endorsement, to the clerk of the United States District Court, Western Division, during the trial of the case and by him deposited into his official funds as funds paid and

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[1]Troxell v. Delaware Lackawanna & Western Railroad Company, 227 U. S. 434, 57 L. Ed. 586, 33 S. Ct. 274.

National Labor Relations Board v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 1091.

Crumpton v. United States, 138 U. S. 361, 34 L. Ed. 958, 11 S. Ct. 355.

held in the registry of the court (R. 210), where they still remain (R. 218) could in no manner constitute an accord and satisfaction. There was no acceptance of the check by the Respondent. To the contrary through his pleadings, he made a tender of the check into the registry of the court (R. 5) and made a formal tender during the trial (R. 210). None of the proceeds of the check were received by Respondent nor did they inure to his benefit. The cases are legion to the effect that to have an accord and satisfaction there must be an acceptance by the party against whom the accord and satisfaction is urged. The cases cited by Petitioners (Pet. 11) on this point are to the same effect.

The decision of the lower court on this point in no way conflicts with any other court of appeals' decision nor does it conflict with applicable state or territorial law nor does this point involve any federal question or law.

(2) Petitioners have contended that the instructions of the trial court furnished no safe and dependable guide to the jury (Pet. 11). They further contended that the trial court erroneously submitted a mixed question of law and fact in its charge to the jury (Pet. 11). In support of their contention Petitioners cited the case of *Kirby H. Jackson, et al. v. C. E. King (5 C. A.), 223 Fed. 2d 714, 718* (Pet. 11). In disposing of these contentions the Court of Appeals had this to say:

> "The district court did not err in submitting to the jury the question calling for a special verdict. This practice is authorized by Rule 49, Fed. Rules Civ. Proc. The court defined 'preponderance of the

evidence' and submitted the question 'Do you find from a preponderance of the evidence, if any, that at the time the contract sued upon was entered into, it was the meaning and intent of the parties thereto that W. O. Pelphrey was to be paid for the limestone rock crushed by him on the basis of $1.01 per cubic yard truck measurement? Answer "Yes" or "No."' The court then charged that the jury was the exclusive judge of the facts proven, of the credibility of witnesses and the weight to be given their testimony. The question propounded was brief, it called for a categorical answer. It posed a narrow question and a question of fact. There was not a mixed question of law and fact such as had our disapproval in *Jackson v. King, 5th Cir. 1955, 223 F. 2d 714.* The instructions to be given by the court as a guide to a jury in returning a special verdict will, as in the case of a general submission, vary with each situation of fact and law. The instructions given in this case were adequate. Neither the form of the question nor the accompanying instructions confused or misled the jury." (Pet. A6.)

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

(3) During the course of the trial leave was granted Respondent to file a trial amendment pleading custom and usage (R. 187) and to introduce evidence on the general usage and custom prevailing in Texas of buying and selling crushed rock at the bins on the basis of truck measurement. Petitioners urge that the admission of such testimony was error. The Court of Appeals, however, in affirming the trial court's judgment, had this to say:

"The well settled doctrine that custom or usage will not vary the terms of a written contract needs no

citation in its support. But the evidence of custom and usage may supply the meanings of words or phrases and supply by implication necessary provisions with respect to which the written instrument is silent. The Texas law has been thus stated:

> "'A valid usage or custom concerning the subject matter of a contract, knowledge of which may be imputed to the parties, is, according to a general rule, incorporated into the contract by implication. This means that where there is nothing in the agreement to exclude the inference, the parties are presumed to have contracted with reference to the usage, provided that it is just and reasonable, and evidence of the usage is admissible, not to vary or contradict the terms of the contract, but to aid in interpreting it and to ascertain with greater certainty what was intended. When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it * * *.
>
> "'It follows from what is said above that if the language of a contract is ambiguous, uncertain, incomplete or inconsistent, evidence of usage or custom is admissible to show the meaning intended by the parties.' 42 Tex. Jur. 843-844, Usages and Customs, Secs. 14, 15.

"The foregoing rule has been recognized by this Court. *Eustis Packing Co. v. Martin, 5th Cir. 1941, 122 F. 2d 648; Black v. Interstate Commerce Commission, 5th Cir. 1948, 167 F. 2d 825.* Neither the letter proposal nor the letter acceptance specifically provides that the quantity of crushed stone should be determined by measurement in place by the United States Engineers, as contended by the Prime Contractors, or by loose truck measurement, as claimed by the subcontractor. The evidence of custom and usage is admissible to supply that which the writings omit." (Pet. A8-A10.)

The holding in the court of appeals on this question in no way conflicts with any other court of appeals' decision nor does it conflict with applicable state or territorial law nor does this point involve any federal question or law.

(4) A question now being presented for the first time by the Petitioners is whether or not the judgment entered for Respondent for "$30,325.33 together with interest thereon at the rate of six per cent (6%) per annum from the 24th day of July, 1953 to the date of this judgment, for an aggregate amount of $33,346.74, * * *" contravenes the Federal Statute *(28 U. S. C. A. Sec. 1961)* (Pet. 6, 13). This point was not included as a part of Petitioners' motion for new trial in the District Court (R. 219). It was not asserted as one of Petitioners' assignments of error to the Court of Appeals (R. 227) nor was it mentioned in Petitioners' petition for rehearing in the Court of Appeals (R. 264-266). Consequently, neither the trial court nor the Court of Appeals has had an opportunity to pass on this question. This court has repeatedly held that it will not decide questions which have not been passed upon by the Court of Appeals.[2]

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[2]Sozinsky v. United States of America, 300 U. S. 506, 81 L. Ed. 772, 57 S. Ct. 554.

Owens v. Union Pacific Railroad Company, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, certiorari denied, 323 U. S. 740, 89 L. Ed. 593, 65 S. Ct. 57.

Saltonstall v. Birtwell, 164 U. S. 54, 41 L. Ed. 348, 17 S. Ct. 19.

Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.

Minnich v. Gardner, 292 U. S. 48, 78 L. Ed. 1115, 54 S. Ct. 567.

Even if Petitioners were entitled to be heard on this question, as a matter of fact, the federal statute relied upon by Petitioners; *28 U. S. C. A. Sec. 1961*, is not applicable to this case. The law where the contract was performed applies and not the Federal law.[3]

Assuming for the sake of argument, however, that the federal statute, *28 U. S. C. A. Sec. 1961*, does apply, the judgment in no way contravenes the statute. The statute provides that interest may be allowed on any money judgment in a civil case recovered in a district court. The judgment entered was for an aggregate of $33,346.74, being $30,325.33 plus 6% interest thereon from July 24, 1953 to date of judgment. Therefore, such judgment constitutes a money judgment in the total amount of $33,346.74. Interest was then allowed thereon from March 24, 1955, the date of the judgment herein. The fact that the total amount of the money judgment included interest on the unpaid balance of the contract price to the date of judgment does not mean that such judgment violates *28 U. S. C. A. Section 1961.* Respondent repeats, however, that this question is entirely moot since same was not passed upon by the lower court.

It is obvious that the foregoing question contains nothing to merit the consideration of this court on petition for writ of certiorari as provided in Rule 19 of this court.

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[3]United States for use and benefit of Lichter v. Henke Construction Co. (8th Cir.), 157 Fed. 2d 13.
Continental Casualty Company v. Clarence L. Boyd Company (10th Cir.), 140 Fed. 2d 115.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

.....

ROBERT F. RITCHIE,
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Attorney for Respondent, United States of America for the use of W. O. Pelphrey.

ROBERT F. RITCHIE,
Of Counsel.

CERTIFICATE

I certify as attorney of record for the Respondent in the above styled and numbered cause in this court that I have this day mailed by air mail, postage prepaid, to William Harold Cox, Esquire, 1109-10 Deposit Guaranty Bank Building, Jackson 1, Mississippi, attorney of record for the petitioners, at his said proper post office address, a true copy of the foregoing brief for the Respondent in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

This May ....., A. D., 1956.

.....

ROBERT F. RITCHIE,
1100 Republic National Bank Building,
Dallas, Texas,
Attorney for Respondent,

APPENDIX

28 U. S. C. A.:

Section 1961. Interest.

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. June 25, 1948, c. 646, 62 Stat. 957.